

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JESSICA MORBECK, on behalf of)
C.H., a minor child,) No. CV-06-0180-MWL
)
Plaintiff,) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
v.)
)
JO ANNE B. BARNHART,)
Commissioner of Social)
Security,)
)
Defendant.)
)

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on December 26, 2006. (Ct. Rec. 15, 17). Jessica Morbeck ("Ms. Morbeck"), on behalf of her minor daughter, C.H. ("Plaintiff"), filed a reply brief on December 18, 2006. (Ct. Rec. 19). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 15), **DENIES** Defendant's Motion for Summary Judgment (Ct. Rec. 17), and **REMANDS** the case for further proceedings.

JURISDICTION

2 On December 3, 2002, Ms. Morbeck filed an application for
3 Supplemental Security Income ("SSI") benefits, on behalf of
4 Plaintiff, alleging Plaintiff's disability since August 14, 2002,
5 due to developmental delays resulting from a cytomegalovirus
6 infection. (Administrative Record ("AR") 51-54, 68). The
7 application was denied initially and on reconsideration. On June
8 2, 2005, an administrative hearing was held before Administrative
9 Law Judge ("ALJ") Mary B. Reed, at which time testimony was taken
10 from Plaintiff's mother, Ms. Morbeck, and medical expert Roger J.
11 Meyer, M.D. (AR 307-337). On October 28, 2005, the ALJ issued a
12 decision finding that Plaintiff was not disabled. (AR 20-28).
13 The Appeals Council denied a request for review on June 2, 2006.
14 (AR 6-9). Therefore, the ALJ's decision became the final decision
15 of the Commissioner, which is appealable to the district court
16 pursuant to 42 U.S.C. § 405(g). On June 14, 2006, Plaintiff filed
17 this action for judicial review pursuant to 42 U.S.C. § 405(g).
18 (Ct. Rec. 1).

STATEMENT OF FACTS

20 The facts have been presented in the administrative hearing
21 transcript, the ALJ's decision, the briefs of both Plaintiff and
22 the Commissioner and will only be summarized here. Plaintiff was
23 three years old on the date of the ALJ's decision. (AR 21).

24 At the administrative hearing held on June 2, 2005,
25 Plaintiff's mother testified that she had an accident when she was
26 about eight months pregnant and subsequent ultrasounds revealed
27 that Plaintiff had fluid around her brain prior to her birth. (AR
28 321-322). Ms. Morbeck stated that, following Plaintiff's birth,

1 she first noticed abnormalities when Plaintiff was about three
2 months old and could not support her own head and could not move
3 her arms and legs. (AR 322). Ms. Morbeck indicated that
4 Plaintiff has been attending speech, occupational and physical
5 therapy. (AR 323).

6 Ms. Morbeck testified that Plaintiff's ability to walk was
7 delayed. (AR 324). She stated that Plaintiff first learned to
8 walk at about 18 to 20 months and was still unsteady on her feet.
9 (AR 324). Ms. Morbeck indicated that Plaintiff had severe hearing
10 loss in her right ear and had been wearing a hearing aide for
11 almost two years. (AR 326). She stated that the digital hearing
12 aide worked well. (AR 326). Although Plaintiff has tubes in both
13 ears, there has been no noticeable decline in hearing in her left
14 ear. (AR 327-328). Ms. Morbeck indicated that Plaintiff also has
15 difficulty with her speech and had been attending therapy for that
16 as well. (AR 329).

17 Ms. Morbeck stated that Plaintiff rides a tricycle and also a
18 scooter made for toddlers. (AR 331). She also stated that
19 Plaintiff can run on a good day. (AR 331). With regard to
20 Plaintiff's speech, Ms. Morbeck testified that most of the time
21 other people cannot understand her, but she is able to understand
22 her child. (AR 331-332). Ms. Morbeck indicated that Plaintiff
23 can understand if given just a couple of words. (AR 333).
24 Plaintiff plays with toys, draws pictures, watches television and
25 reads books. (AR 332). Ms. Morbeck stated that she reads to
26 Plaintiff and Plaintiff will sit for a long time and listen to the
27 reading. (AR 333). Plaintiff also plays with neighbor kids and
28 other kids at her preschool. (AR 334). Ms. Morbeck also reported

1 that Plaintiff is able to feed herself using a fork or spoon,
2 drink from a cup and brush her teeth. (AR 335).

3 Medical expert, Roger J. Meyer, M.D., was also called upon to
4 give testimony at the administrative hearing on June 2, 2005. (AR
5 312-321). Dr. Meyer testified that while Plaintiff had several
6 severe impairments, the impairments did not meet or equal any of
7 the Listings impairments. (AR 313-314). He opined that all six
8 of Plaintiff's functional domains were less than marked. (AR
9 314). Dr. Meyer indicated that there does not seem to be any
10 evidence of any significant serious delay that would meet or equal
11 anything in the criteria. (AR 314). According to the evidence,
12 Dr. Meyer stated that Plaintiff continues to develop and grow in a
13 satisfactory fashion. (AR 315). Dr. Meyer testified that tests
14 reveal some mild delays, but noted that Plaintiff was making good
15 progress. (AR 316). He indicated that the prognosis for these
16 types of children, with a fixed, non-recurring brain impairment,
17 is very good. (AR 318).

18 At the request of Plaintiff's attorney, the ALJ left the
19 record open for 30 days for Plaintiff's attorney to present
20 additional records. (AR 336). It has not been explained why the
21 additional materials that were later submitted to the Appeals
22 Council were not submitted to the ALJ during this time period.

23 **SEQUENTIAL EVALUATION PROCESS**

24 On August 22, 1996, Congress passed the Personal
25 Responsibility and Work Opportunity Reconciliation Act of 1996,
26 Pub. L. 104-193, 110 Stat. 105 which amended 42 U.S.C. §
27 1382c(a)(3). Under this law, a child under the age of eighteen is
28 considered disabled for the purposes of SSI benefits if "that

1 individual has a medically determinable physical or mental
2 impairment, which results in marked and severe functional
3 limitations, and which can be expected to result in death or which
4 has lasted or can be expected to last for a continuous period of
5 not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i) (2003).

6 The regulations provide a three-step process in determining
7 whether a child is disabled. First, the ALJ must determine
8 whether the child is engaged in substantial gainful activity. 20
9 C.F.R. § 416.924(b). If the child is not engaged in substantial
10 gainful activity, then the analysis proceeds to step two. Step
11 two requires the ALJ to determine whether the child's impairment
12 or combination of impairments is severe. 20 C.F.R. § 416.924(c).
13 The child will not be found to have a severe impairment if it
14 constitutes a "slight abnormality or combination of slight
15 abnormalities that causes no more than minimal functional
16 limitations." *Id.* If, however, there is a finding of severe
17 impairment, the analysis proceeds to the final step which requires
18 the ALJ to determine whether the impairment or combination of
19 impairments "meet, medically equal or functionally equal" the
20 severity of a set of criteria for an impairment in the listings.
21 20 C.F.R. § 416.924(d).

22 The regulations provide that an impairment will be found to
23 be functionally equivalent to a listed impairment if it results in
24 extreme limitations in one area of functioning or marked
25 limitations in two areas. 20 C.F.R. § 416.926a(a). To determine
26 functional equivalence, the following six domains, or broad areas
27 of functioning, are utilized: acquiring and using information,
28 attending and completing tasks, interacting and relating with

1 others, moving about and manipulating objects, caring for yourself
 2 and health and physical well-being. 20 C.F.R. § 416.926a.

3 **STANDARD OF REVIEW**

4 Congress has provided a limited scope of judicial review of a
 5 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
 6 the Commissioner's decision, made through an ALJ, when the
 7 determination is not based on legal error and is supported by
 8 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
 9 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
 10 1999). "The [Commissioner's] determination that a plaintiff is
 11 not disabled will be upheld if the findings of fact are supported
 12 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
 13 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
 14 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
 15 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
 16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
 17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
 18 573, 576 (9th Cir. 1988). Substantial evidence "means such
 19 evidence as a reasonable mind might accept as adequate to support
 20 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 21 (citations omitted). "[S]uch inferences and conclusions as the
 22 [Commissioner] may reasonably draw from the evidence" will also be
 23 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
 24 On review, the court considers the record as a whole, not just the
 25 evidence supporting the decision of the Commissioner. *Weetman v.*
 26 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
 27 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

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1 It is the role of the trier of fact, not this court, to
2 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
3 evidence supports more than one rational interpretation, the court
4 may not substitute its judgment for that of the Commissioner.
5 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
6 (9th Cir. 1984). Nevertheless, a decision supported by
7 substantial evidence will still be set aside if the proper legal
8 standards were not applied in weighing the evidence and making the
9 decision. *Brawner v. Secretary of Health and Human Services*, 839
10 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
11 evidence to support the administrative findings, or if there is
12 conflicting evidence that will support a finding of either
13 disability or nondisability, the finding of the Commissioner is
14 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
15 1987).

ALJ'S FINDINGS

17 The ALJ found at step one that, at three years old, Plaintiff
18 has never engaged in substantial gainful activity. (AR 21). At
19 steps two, the ALJ determined that Plaintiff suffers from the
20 following severe impairments: hearing loss, developmental delays,
21 and congenital cytomegalovirus infection. (AR 21). The ALJ
22 determined that the evidence of record demonstrated that
23 Plaintiff's impairments, although severe, do not meet, medically
24 equal, or functionally equal the criteria of any of the listings
25 impairments. (AR 23). With regard to functional equivalence, the
26 ALJ concluded that Plaintiff has less than marked limitations in
27 acquiring and using information, attending and completing tasks,
28 interacting and relating with others, moving about and

1 manipulating objects, caring for herself (self-care), and health
 2 and physical well being. (AR 25-27). The ALJ thus determined
 3 that Plaintiff's impairments did not result in any marked or
 4 extreme limitations in any of the assessed domains. (AR 27).
 5 Accordingly, the ALJ concluded Plaintiff was not under a
 6 disability within the meaning of the Social Security Act. (AR
 7 28).

8 **ISSUES**

9 Plaintiff contends that the Commissioner erred as a matter of
 10 law. Specifically, she argues that:

11 1. The ALJ erred by relying on the testimony of the medical
 12 expert rather than the opinion of examining and treating physician
 13 sources; and

14 2. Based on newly submitted evidence, the record
 15 demonstrates that Plaintiff has at least three marked limitations
 16 in the six domains thus establishing functional equivalence.

17 The Court must uphold the Commissioner's determination that
 18 Plaintiff is not disabled if the Commissioner applied the proper
 19 legal standards and there is substantial evidence in the record as
 20 a whole to support the decision.

21 **DISCUSSION**

22 Plaintiff argues that, based on a June 16, 2005 letter from
 23 Plaintiff's treating physician, Kenneth J. Kapstafer, M.D.,¹ and
 24 evidence submitted to the Appeals Council following the ALJ's

25
 26 ¹Despite argument by Plaintiff to the contrary (Ct. Rec. 16, p. 9),
 27 Dr. Kapstafer's letter actually lends support to the ALJ's determination in
 28 this case. Dr. Kapstafer opined that Plaintiff has developmental delays,
 but was progressing in a slow steady pace. (AR 282). His letter indicated
 that she had demonstrated much improvement in her growth and development.
 (AR 282). These findings are consistent with the ALJ's opinion in this case.

1 determination in this case, the Commissioner should have
2 determined that Plaintiff functionally equaled the listings. (Ct.
3 Rec. 16, pp. 7-13). Plaintiff specifically asserts that, contrary
4 to the medical expert's testimony, the record reflects that she
5 has marked limitations in self-care, moving about and manipulating
6 objects, and interacting and relating with others. (*Id.*)

7 The ALJ evaluated the record, including the hearing
8 testimony, various medical evaluations, Dr. Kapstafer's June 16,
9 2005 letter, state agency reviewing physician reports and Dr.
10 Meyer's expert testimony, and concluded that Plaintiff had less
11 than marked functional limitations in all six domains of
12 functioning. (AR 22-27). The ALJ's opinion is not based solely
13 on the medical expert's opinion, rather it takes into
14 consideration all evidence available to her at that time. (*Id.*)
15 The undersigned finds that the ALJ's decision would be appropriate
16 based on the evidence presented to her at that time. However,
17 despite leaving the record open for 30 days following the June 2,
18 2005 administrative hearing (AR 336), the ALJ was not given the
19 opportunity to review the additional records submitted to the
20 Appeals Council. (AR 5, 284-306).

21 42 U.S.C. § 1382c(a)(3)(I) directs that, before making a
22 determination whether a child is disabled within the meaning of
23 the Social Security Act, an ALJ must obtain a case evaluation by a
24 pediatrician or other appropriate specialist who considers the
25 record in its entirety. *Howard ex rel. Wolff v. Barnhart*, 341
26 F.3d 1006, 1014 (9th Cir. 2003).

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1 In this case, Roger J. Meyer, M.D., testified as a medical
2 expert at the administrative hearing. (AR 312-321). Dr. Meyer
3 stated that his review of the record, in its entirety, revealed
4 that all six of Plaintiff's functional domains were less than
5 marked. (AR 314). Dr. Meyer indicated that there did not seem to
6 be any evidence of any significant serious delay. (AR 314). He
7 testified that tests reveal some mild delays, but noted that
8 Plaintiff was making good progress and continued to develop and
9 grow in a satisfactory fashion. (AR 315-316). Nevertheless, Dr.
10 Meyer did not have the opportunity to review the Spokane Public
11 Schools' test results from March, April and May of 2005 (AR 284-
12 298), the records of the Hearing and Speech Clinic dated May 26,
13 2005 (AR 299-300), the record of Spokane ENT Clinic dated
14 September 20, 2005 through March 14, 2006 (AR 301-302) and the
15 records of Holy Family Rehabilitation Services dated October 20,
16 2005 (AR 303-306).

17 The Spokane Public Schools records consist of an
18 adaptive/social evaluation, a hearing evaluation and vision
19 screening, a psychological evaluation, an occupational therapy
20 evaluation, a physical therapy evaluation, a communication
21 disorders evaluation and a summary analysis. (AR 284-298).

22 The March 29, 2005 adaptive/social evaluation suggested "a
23 significant delay" in Plaintiff's adaptive behaviors. (AR 284-
24 285). It was noted that the results of Plaintiff's Developmental
25 Inventory test indicated an adaptive total standard score of 65, a
26 standard deviation of -2.33. (AR 284). Test results also
27 suggested that Plaintiff's personal-social skills fell within the
28 average range for a child her age. (AR 285).

1 It was noted in the March 31, 2005 summary of Plaintiff's
2 hearing evaluation that Plaintiff had a significant hearing loss
3 in her right ear. (AR 286-287). The audiologist indicated that
4 the loss "has the potential to adversely impact speech and
5 language development and academic progress." (AR 287).

6 The April 29, 2005 psychological evaluation revealed that
7 Plaintiff's cognitive functioning fell in the average range. (AR
8 288). The results of the April 29, 2005 occupational therapy
9 evaluation found that Plaintiff's performance did not indicate a
10 need for occupational therapy services. (AR 289-290). It was
11 noted that Plaintiff was a "delightful" girl who demonstrated
12 functional fine motor skills. (AR 290).

13 The April 29, 2005 physical therapy evaluation revealed the
14 following adverse affects upon Plaintiff's educational
15 performance: a delay in gross motor skills, a lack of motor
16 abilities to function safely within a school environment, an
17 inability to participate adequately in a gross motor group, and an
18 inability to access and use educational materials adequately. (AR
19 291). It was noted that the results of the Battelle Gross Motor
20 Domain test revealed a standard deviation of -1.56. (AR 291).

21 The May 12, 2005 summary analysis of Plaintiff's testing
22 stated that Plaintiff has a significant (perhaps severe to
23 profound) hearing loss in her right ear, test results suggest a
24 significant delay in her adaptive behaviors, and test results
25 suggest that her personal-social skills fell within the average
26 range for a child her age. (AR 293). It was noted that the
27 evaluation did not reflect any behaviors that significantly
28 interfered with Plaintiff's educational performance. (AR 293).

1 Test results further demonstrated that Plaintiff's
2 educational performance was adversely affected by a documented
3 communication disorder. (AR 294). With regard to language, it
4 was noted that Plaintiff has a significant delay in her
5 articulation/phonological skills and was functioning at a level
6 which was at least 1.5 standard deviations below the mean for her
7 chronological age group. (AR 294).

8 Plaintiff's level of performance did not indicate a need for
9 occupational therapy services in the school environment. (AR
10 294). However, the physical therapy evaluation found that
11 Plaintiff does have a delay in gross motor skills. (AR 295). It
12 was noted that Plaintiff did not have the motor abilities to
13 function safely within a school environment, was not able to
14 participate adequately in a gross motor group, was not able to
15 access and use educational materials adequately and requires
16 specially designed instruction from physical therapy staff. (AR
17 295).

18 The summary also indicated that Plaintiff's health records
19 revealed health/physical conditions which may affect her
20 educational programming. (AR 295). However, Plaintiff's
21 congenital cytomegalovirus infection did not currently present as
22 a condition and her hearing impairment would thus be considered
23 the primary disability. (AR 295).

24 The ALJ additionally did not have available for her review an
25 October 20, 2005 physical therapy evaluation report. (AR 303-
26 306). This report documented "significant delay in locomotion
27 skills and balance skills." (AR 305).

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1 The Spokane Public Schools records, as well as the physical
2 therapy evaluation report, were not before the ALJ, but were
3 submitted to, and considered by, the Appeals Council in this case.
4 (AR 6-9). Since the Appeals Council "considered" the evidence,
5 that evidence is now a part of the administrative record subject
6 to the Court's review, even though the evidence was never seen by
7 the ALJ. Contrary to the Commissioner's argument (Ct. Rec. 18,
8 pp. 13-15), there is no need to conduct a good cause/materiality
9 inquiry as to whether the Court can consider the evidence or
10 whether the Court should remand based on the evidence, as the
11 evidence is already a part of the record. *Harman v. Apfel*, 211
12 F.3d 1172, 1179-80 (9th Cir. 2000) (stating that where claimant
13 submitted additional materials to the Appeals Council in
14 requesting review of the ALJ's decision, "[w]e may properly
15 consider the additional materials because the Appeals Council
16 addressed them in the context of denying Appellant's request for
17 review"); *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9th Cir. 1993)
18 (noting that where the Appeals Council declined to review the
19 decision of the ALJ after examining the entire record, including
20 new material, we considered both the ALJ's decision and the
21 additional materials submitted to the Appeals Council).
22 Accordingly, the undersigned must consider whether the ALJ's
23 decision was supported by substantial evidence and free from legal
24 error while reviewing the entire record, including the additional
25 records that were later added to the record.

26 Neither Dr. Meyer, nor any other medical professional of
27 record, evaluated Plaintiff's case in its entirety; taking into
28 consideration the Spokane Public Schools' records and the physical
therapy evaluation report in addition to all other evidence of

1 record. Although the Commissioner argues that the newly submitted
 2 evidence would not change the outcome of the ALJ's decision
 3 because it does not differ from the ALJ's conclusions (Ct. Rec.
 4 18, p. 14), in order to make a proper determination, this Court
 5 would have to evaluate and quantify the newly submitted evidence,
 6 which is not the province of the Court. *Andrews v. Shalala*, 53
 7 F.3d 1035, 1039 (9th Cir. 1995); 42 U.S.C. § 405(g). The new
 8 evidence, in conjunction with all other evidence of record, should
 9 have been evaluated by a qualified pediatrician or other
 10 individual who specializes in a field appropriate to the alleged
 11 disability of Plaintiff. *Wolff*, 341 F.3d at 1014; 42 U.S.C. §
 12 1382c(a)(3)(I). Since it is clear, as in the *Wolff* case, that
 13 Plaintiff's case was not evaluated, as a whole, by a trained
 14 medical professional, the undersigned cannot find that the ALJ's
 15 determination is supported by substantial evidence.

16 Based on the foregoing, the undersigned finds that the newly
 17 submitted evidence warrants a remand in this case. Pursuant to 42
 18 U.S.C. § 1382c(a)(3)(I), the ALJ shall, on remand, obtain a case
 19 evaluation from a pediatrician or other appropriate specialist
 20 based on the record in its entirety, including the records sent to
 21 and considered by the Appeals Council (AR 284-306).

22 **CONCLUSION**

23 Plaintiff argues that this Court should reverse the ALJ's
 24 decision and award benefits. (Ct. Rec. 16). The Court has the
 25 discretion to remand the case for additional evidence and finding
 26 or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th
 27 Cir. 1996). The Court may award benefits if the record is fully
 28 developed and further administrative proceedings would serve no
 useful purpose. *Id.* Remand is appropriate when additional

1 administrative proceedings could remedy defects. *Rodriguez v.*
2 *Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, further
3 development is necessary for a proper determination to be made.

4 On remand, the ALJ shall procure medical consultant
5 information or elicit medical expert testimony at a new
6 administrative hearing. The medical professional shall evaluate
7 Plaintiff's case in its entirety, taking into consideration the
8 newly submitted evidence (AR 284-306) in addition to all other
9 relevant evidence of record. The medical professional shall
10 address the Listings, as well as the six domains of functioning.
11 The ALJ shall also take into consideration any other evidence or
12 testimony relevant to Plaintiff's disability claim.

13 Accordingly, **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is
15 **GRANTED** in part and the above captioned matter is **REMANDED** for
16 additional proceedings as outlined above and pursuant to sentence
17 four of 42 U.S.C. § 405(g).

18 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
19 **DENIED**.

20 3. Judgment shall be entered for **PLAINTIFF**. An application
21 for attorney fees may be filed by separate motion.

22 4. The District Court Executive is directed to enter this
23 Order, provide a copy to counsel for Plaintiff and Defendant, and
24 **CLOSE** the file.

25 **DATED** this 22nd day of January, 2007.

26

27

s/Michael W. Leavitt
MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE

28